UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 25-CA-219925

Alcoa Corporation,

and

United Steel, Paper and Forestry,
Rubber, Manufacturing, Energy,
Allied Industrial and Service Workers
Local 104

ALCOA CORPORATION'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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Dated: April 24, 2019

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UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS LOCAL 104

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Consistent with Section 102.46 of the National Labor Relations Board's ("the Board") Rules and Regulations, Respondent submits this Brief in Support of Exceptions. This matter arises out of an unfair labor practice filed against Respondent Alcoa Corporation ("Alcoa" or "Respondent") by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Local 104 ("the Union" or "USW"). The hearing of on this matter was held on February 5, 2019. The Administrative Law Judge ("ALJ") issued his decision on March 27, 2019. Respondent now excepts to many aspects of the ALJ's Decision related to alleged violations of Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("the Act").

As discussed in Respondent's exceptions and the brief below, the ALJ made erroneous findings, rulings, and conclusions. The record evidence, when viewed fairly and consistently with applicable precedent, demonstrates that Respondent acted consistently with its obligations under the Act.[1]

[1] References to the ALJ's Decision are identified by the letter "D" followed by page and line number, e.g., "D. ___:___." References to the hearing transcript will be "Tr." followed by the appropriate page number. General Counsel exhibits, Union exhibits, and Respondent exhibits will be similarly referenced "GC Ex.," "U. Ex.," or "R. Ex." followed by the exhibit number.

I. QUESTIONS INVOLVED

This case boils down to two determinative issues:

1. Did Respondent violate Sections 8(a)(1) and (5) of the Act by failing to provide bargaining unit witness names to the Union and providing interview dates two months after the Union's request?

2. Did Respondent violate Section 8(a)(1) of the Act when it asked employees to keep in mind that Respondent's investigation into the alleged use of racial slurs was confidential?

As detailed below and in Respondent's Post-Hearing Brief, the undisputed facts and applicable legal authorities require a resounding "no" to each question. Indeed, the facts and authorities established that:

1. Respondent acted lawfully under established Board precedent in light of the sensitive nature of its investigation and its confidentiality concerns.

2. The ALJ's findings, conclusions, and proposed remedies fail to properly consider the record evidence, and applicable legal precedent.

II. FACTS

The facts in this case are not largely in dispute. In late March 2018, Alcoa began investigating allegations that bargaining unit employee Ron Williams ("Williams") used racial slurs toward a contract truck driver. (GC Ex. 3; Underhill Tr. 14). As part of its investigation, Labor Relations Specialist Terrence Carr ("Carr") interviewed six bargaining unit employees. (GC Ex. 13, 14). During these interviews, Carr said to employees to "keep in mind the conversations were confidential," meaning he would not divulge the contents of the discussions to anyone, and that employees should also keep the conversation confidential**.** (Tr. 54-55). Carr did not threaten employees with any repercussions if they broke confidentiality. Carr gave this instruction to

employees based on a history at the plant of employees' non-participation in investigations and believed if he did not provide assurances regarding confidentiality employees may not speak candidly. (Carr Tr. 56). Based on these assurances from Carr, all of these employees confirmed that Williams used racial slurs or otherwise acted inappropriately in the workplace and four of the six employees gave written statements (either immediately following the interview or in the days following). (GC Ex. 10). None of the employees requested Union representation during the interviews, though it was offered. (Carr Tr. 69). After completing its investigation, Williams was suspended pending termination and then terminated. (GC Ex. 3, 7; Underhill Tr. 21). The Union grieved this action. (GC Ex. 8).

On April 16, 2018, the Union requested, among other items:

> Information pertaining to the interviews of the one Dayshift Hourly employee and the five afternoon shift hourly employees that were provided by the Company per the information request by Bruce Price on or about April 7, 2018. Information should include [n]ame that coincides with each interview, the date the interview took place, the location were [sic] the interview took place and a list of who was present when the interviews took place.

(GC Ex. 9).[2] Carr responded that "[b]ased on confidentiality request of employee's [sic] names will not be shared at this time." (GC Ex. 10). In an effort to accommodate the Union's request but protect employees from potential retaliation, Carr provided the four written statements he received from bargaining unit employees with the names redacted. (Id.). As Carr testified, historically hourly employees at the Warrick facility did not write statements so Alcoa believed it

[2] Underhill alleged the information was needed to "follow up and investigate whether or not the interviews and the actual process was done, and also to allow us to do an internal investigation and to check up on the facts." (Underhill Tr. 24-25). Despite this claimed desire, Underhill admitted that the Union never interviewed the one employee who disclosed he was a witness and provided a statement to Carr and did not conduct its own investigation. (Underhill Tr. 41).

would be best to redact the names to encourage future participation in investigations. (Carr Tr. 56).

In response, on April 26, 2018, the Union ignored Respondent's offered accommodation and instead, insisted on the unredacted statements because the Union "has a legal right to the information," without further explanation. (GC Ex. 11). As Union Business Agent Tim Underhill ("Underhill") admitted, the Union did not offer a confidentiality agreement or otherwise attempt to address the employee confidentiality concerns. (Underhill Tr. 40). It merely demanded the information. This same day, Pack Ship Crew Leader Wade Shanks ("Shanks") emailed Carr about concerns bargaining unit employee John Taborn ("Taborn") raised about negative and retaliatory treatment he received.[3] (R. Ex. 1). According to Shanks, Taborn reported that someone (who Taborn believed to be Union officials) put garbage and salt in his boots. (Id.). Shanks reported that Shanks believed Taborn was being retaliated against because Taborn cooperated in Alcoa's in investigation of Williams, a fellow bargaining unit member, and confirmed Williams' use of racial remarks. Shanks also reported that he had heard there was animosity directed at Taborn based on his participation in the investigation into Williams. (Id.).

[3] The General Counsel asserts Shanks' email should be ignored because it is hearsay; however, the email is not being used to establish that Taborn was in fact being retaliated against, rather, to establish Respondent's state of mind in responding to the Union's requests. Where not being used to establish the truth of the matter asserted, the email is not hearsay. (Fed. R. Evid. 801). The General Counsel then implied the ALJ should reject the email because Shanks may have just fabricated the entire report or misstated what was reported to him. This claim should similarly be rejected. As Carr testified, he considered the email when considering whether to break employee confidentiality. (Carr Tr. 57-58). Shanks had no reason to lie and make false accusations. Instead, he merely sought to report employee concerns to Carr and provide his own opinion about potential future retaliation. (R. Ex. 1). Moreover, Taborn later sent Carr an email directly, advising him of additional negative treatment by the Union based on Taborn's participation in Alcoa's investigation. (R. Ex. 2). It defies logic that Shanks fabricated Taborn's initial report and then was able to convince Taborn to participate in his ongoing ruse. Nonetheless, the ALJ did not give appropriate weight to Taborn's emails or Respondent's concerns.

In light of Shanks' report, Carr continued to deny the Union's request for witness names. On April 30, 2018, Carr responded to the Union's April 26, 2018 request. (Underhill Tr. 34). Carr noted that Respondent's need to maintain confidentiality outweighs the Union's right to the information. (GC Ex. 12). Carr emphasized that employees were given assurances of confidentiality and there was "a significant risk that intimidation or harassment of witnesses will occur ***as demonstrated by a recent incident of misconduct reported to management.***" (Emphasis added)(Id.). Carr also noted that the Company accommodated the Union's request by providing the redacted statements. (Id.). The Union did not respond to this claim. Instead, on May 1, 2018, the Union made another request for information, requesting new documents as well as a follow up request to a "partial response" related to witness statements, requesting what it believed were two withheld statements. (GC Ex. 13). The Union did not further request the witness names or the dates of the interview. Alcoa did clarify that there were no additional statements. (GC Ex. 14). Following this response, on May 18, 2018, Carr received an email from Taborn directly, informing Carr that Taborn had been removed from his union position because the Union alleged Taborn "was creating a violent environment," apparently by giving evidence against his union brother during Alcoa's investigation. (R. Ex. 2). Taborn told the Union that he had provided a statement to Alcoa regarding Williams and in response, the Union removed Taborn from his position as steward. (Id.). This further validated Carr's belief that retaliation would – and did – occur if witness names were revealed.

What Carr did not realize, is that in redacting the witness names from their statements, the dates of the statements were also covered. As a result, the dates of the statements were not provided to the Union until July 2, 2018. (Carr Tr. 63-64). "[I]t was simply an oversight." (Carr Tr. 63). Once Carr noticed his error, he, "unsolicited," sent the dates to the Union in an effort to

correct the oversight. (Underhill Tr. 39). There was no evidence presented that the Union was prejudiced in any way by the slight delay in providing this information.

The arbitration over Williams' grievance was held on January 24, 2018. (Underhill Tr. 41). The witness names were not disclosed at the hearing and the record in the hearing closed. (Underhill Tr. 45).

III. ARGUMENT

A. The ALJ Erred in Finding Respondent Unlawfully Directed Employees to Keep Its Investigation Confidential (Exception 1))

1. ALJ Ignored Respondent's Legitimate Concerns Related to Confidentiality

The ALJ found that Carr's statement to employees during his investigation that "employees should keep the conversations confidential" was unlawful because it "prohibit[s] any discussions the interviewees might want to have with anybody at all, including their collective bargaining representative." (D. 6:19-21). In so finding, the ALJ does not rely on any testimony from any witness that they wanted to discuss the matter with their Union representative but did not because of the instruction because there was no such testimony on the record. Similarly, there is no evidence that employees felt chilled in their ability to discuss the matter with their coworkers or Union representative. In fact, the only evidence on the record demonstrates that none of the interviewed employees wanted Union representation present during their interviews with Carr. (Carr Tr. 69). Instead, the ALJ found that Carr's statement that employees should keep the conversation confidential was an unlawful restriction on employees' right to discuss discipline.

In so doing, the ALJ ignored Respondent's reasons for requesting confidentiality. As the Board noted in *Caesar's Palace*, 336 NLRB 271, 272 (2001), an employer may prohibit employee discussion of an investigation when its need for confidentiality with respect to that specific investigation outweighs employees' Section 7 rights. There is no evidence Alcoa applied a blanket

confidentiality policy and in fact, the Complaint does not allege any such policy exists. Instead, the Union objects to Carr's request that employees should keep the discussion confidential. This request did not accompany any threat should employees not maintain confidentiality or otherwise employees would face repercussions for breaking confidentiality. In fact, at least one of the witnesses, John Taborn ("Taborn") reported to Carr that he discussed his participation in Respondent's investigation and the contents of his statement. (R. Ex. 2). Taborn obviously did not interpret Carr's statement to prohibit his ability to discuss the investigation with the Union (or anyone else for that matter) in any way.

While Carr urged employees that they should keep the investigation confidential, he did so in light of employees' historic non-participation in investigations. (Carr Tr. 56). The ALJ rejected this concern because there was no "evidence of specific examples" of this historical reticence. (D. 6:29-30). However, there is absolutely no evidence that Carr manufactured this reason solely to support his request in this case. Instead, as admitted at hearing, Carr told employees that he would keep the conversation confidential in order to encourage employees to talk to him. (Tr. 54-55). Carr then asked employees to keep the investigation confidential, in part, to encourage participation by employees so none of the witnesses felt like they had to discuss the investigation with their peers, or anyone else, if they did not so desire.

2. ALJ Incorrectly Relied on Precedent Where Employees Faced Repercussions for Violating Confidentiality as no Such Concerns Where Present in the Instant Case

The ALJ relies on *Verizon Wireless,* 349 NLRB 640 (2007) in support of his finding that Carr's statement violated the Act; however, in *Verizon Wireless*, the employer implemented generalized rules prohibiting employees from discussing their discipline and non-work matters at all times at work in response to a union campaign. This is hardly the same as Carr's reminder that employees should keep an investigation into the use of racial slurs confidential, given the sensitive

nature of the investigation. Similarly, the ALJ relied on *SNE Enterprises, Inc.*, 347 NLRB 472 (2006), *enfd.* 257 Fed. Appx. 642 (4th Cir. 2007) in which the employer prohibited an employee from discussing his own discipline and ultimately terminated the employee for violating this prohibition. Again, this is clearly distinguishable from Carr's statement in the instant matter. Likewise, in *Westside Community Mental Health Center*, 327 NLRB 661 (1999), another case relied upon by the ALJ, the Board found the employer unlawfully prohibited employees from discussing their own discipline. There is absolutely no evidence that Carr instructed Williams he could not discuss his discipline or Respondent's investigation with others, including his union representatives. Instead, Carr requested witnesses should keep the discussion confidential. This is clearly distinguishable from the cases cited by the ALJ.

The ALJ erred in finding that Respondent violated the Act by reminding employees they should keep the conversation confidential. No employee interpreted Carr's comments to be a restriction on their right to discuss the investigation – in fact, Taborn did just the opposite and discussed his participation in the investigation with the Union. Carr's statement to employees that they should keep the conversation confidential, in light of the sensitive nature of the investigation and employees' historical reluctance to participate in investigations, did not interfere with employees' ability to discuss the matter with the Union had they so desired, just as Taborn did. Respondent did not violate the Act and the ALJ's decision to the contrary should be reversed.

B. The ALJ's Determination That Respondent Violated the Act by Refusing to Provide Witness Names is in Error and Should be Reversed (Exception 2)

The ALJ similarly erred in finding Respondent violated Section 8(a)(5) of the Act by failing to provide the Union with the names of the witnesses who participated in Respondent's investigation where Respondent had concerns of retaliation if the names were disclosed. As Carr testified, Alcoa had a need to maintain confidentiality based on a history of employees not

participating in investigations or writing statements against other bargaining unit employees out of fear of retaliation or harassment. (Carr Tr. 56). Alcoa had a need to encourage employees to participate in investigations then and in the future, especially where the topic of the investigation involved the use of racial slurs. Further, each of the witnesses was given an assurance of confidentiality prior to providing a statement. This was part of Alcoa's effort to encourage employee candor and an assurance Alcoa did not take lightly.

1. ALJ Erroneously Found Union's Generalized "Need" for Information Outweighed Respondent's Legitimate Concerns of Retaliation

In contrast, the Union made a generalized claim that it needed the witness names to "follow up and investigate whether or not the interviews and the actual process was done, and also to allow us to do an internal investigation and to check up on the facts." (Underhill Tr. 24-25). Despite this claimed need, Union Business Agent Tim Underhill admitted that the Union did not conduct any independent investigation, even with the witness names it was provided. (Underhill Tr. 41). While the Union demanded the information, it never used any of the information it actually received. Instead, the only evidence presented at hearing established that when the Union received a witness name, after Taborn self-identified himself as a witness, employees engaged in retaliation. Admittedly, when Carr first denied the Union's request for the witness names he did not have any specific knowledge of retaliation or reprisals by the Union (Tr. 54); however, as Carr noted, employees typically did not participate in investigations and, in an effort to continue employee cooperation, Carr wanted to protect witnesses as long as possible. (Carr Tr. 56).

The Board has recognized the type of information that gives rise to a "legitimate and substantial confidentiality interest," including "that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses." *Northern Indiana Public Service Company (NIPSCO)*, 347 NLRB 210, 211 (2006), *citing Detroit Newspaper Agency*, 317 NLRB

1071, 1073 (2004). This is the exact scenario of which Alcoa was concerned. Despite these concerns, the ALJ summarily dismissed Respondent's concerns, finding Alcoa "failed to establish a legitimate interest in confidentiality, must less one that outweighs the Union's need for the information." (D. 7:40). In so finding, the ALJ ignores the specious nature of the Union's claimed "need" for the information. The Union admitted that it did not actually conduct its own investigation and arguably would not have used the information even if it had received the witness names. Notwithstanding, the ALJ found this vague need for the information outweighs Respondent's legitimate concerns of retaliation if the names were disclosed – concerns which became a reality.

The ALJ rejected Taborn's received retaliation as a legitimate need for confidentiality because Respondent did not conduct an investigation into Taborn's claims. (D. 8:25-33). In so doing, the ALJ seems to require Respondent determine who actually committed the misconduct in order to have concerns that additional retaliation would occur if the witness names were disclosed. This is simply untrue. While Respondent realized it likely could not determine the culprit behind the boots incident, that did not in any way downplay the fact that Taborn was retaliated against based on his participation in Respondent's investigation. In order to discipline someone for vandalizing Taborn's boots, Respondent would have needed more than rumor to establish just cause; however, these rumors were sufficient to raise concerns of continued retaliation. The ALJ's complete rejection of Respondent's concerns must be reversed. Moreover, while the ALJ correctly notes that the Union's removal of Taborn as Union steward is "a purely internal union matter," the Union's statements to Taborn regarding the reason for this removal gave Respondent reason to continue withholding the witness names. (D. 8:52). Respondent did not attempt to be involved in the Union's internal affairs but, in light of the prior poor treatment toward Carr, had concerns that

further retaliation would occur, and not just of the internal Union affair variety. The treatment received by Taborn was indicative of what Respondent believed would occur if any additional witness names were disclosed. As such, Respondent had a legitimate and substantial need in maintaining confidentiality, one that outweighed the Union's generalized need to "investigate" (though it did not actually do so). *Detroit Edison v. NLRB*, 440 U.S. 301 (1979); *NIPSCO*, 347 NLRB 210 (2006). Because Respondent's confidentiality concerns outweigh the Union's need for information, the witness names were properly withheld. *Piedmont Gardens*, 362 NLRB No. 139 (2015). The ALJ's finding to the contrary should be reversed.

2. ALJ Completely Ignored that Respondent Offered the Union an Accommodation to Its Request in Light of Confidentiality Concerns and the Union Failed to Respond

The ALJ further erred when he wholly ignored the fact that Respondent offered the Union an accommodation in response to its request for the witness names and provided the redacted witness statements as well as descriptions of each witness, including the shift worked and area of assignment. (GC Ex. 10, 12, 15). Alcoa did not deny the Union all information related to witness statements and instead, attempted to accommodate the Union's request. *See e.g. Borgess Medical Center*, 342 NLRB 1105, 1106 (2004). As the evidence establishes, the Union requested "[i]nformation pertaining to the interviews" of certain bargaining unit employees, including the names of those who were interviewed. The Union did not explicitly request witness statements. Moreover, Alcoa did not completely deny the Union's request. Instead, the Union received the witness statements, detailing what each of the witnesses observed, which would allow the Union to conduct its own investigation into the allegations. The Union did nothing. Since the Union made no attempt to investigate the allegations against Williams on its own, one must assume the only reason the Union wanted the witness names was so it could intimidate them or attempt to get

the witnesses to change their statements. The Union otherwise had the information necessary to conduct its own investigation and defend against the allegations to the best of its abilities.

After Alcoa offered the accommodation, the Union responded only to demand the witness names. The Union did not attempt to negotiate an alternative or in any way recognize Respondent's concerns. At the same time the Union renewed its demand for witness names, Carr received reports of Taborn's mistreatment. In light of this retaliation, Carr informed the Union that "there is a significant risk that intimidation or harassment of witnesses will occur as demonstrated by a recent incident of misconduct." (GC Ex. 12). Carr also pointed out that Alcoa had accommodated the Union's request by providing the redacted statements. (Id.). Following Alcoa's second denial of the witness names, the Union did not make any further requests for the information.

The ALJ completely ignored Respondent's efforts to provide the Union with information so the Union could investigate the grievance, while still protecting the witnesses from retaliation. Respondent offered the union an accommodation and the Union did nothing to negotiate any further accommodation. In fact, it did not respond except to again demand the information – ignoring altogether Respondent's concerns. Alcoa met its obligations under the Act. It had a substantial need to protect witnesses from retaliation but nonetheless, offered an accommodation. The ALJ's finding that Respondent violated Sections 8(a)(1) and (5) by failing to provide the witness names is erroneous when viewed in light of circumstances surrounding the request.

C. The ALJ's Determination that Respondent Unlawfully Delayed in Providing Interview Dates is Erroneous and Should be Reversed (Exceptions 3, 4)

In determining that Respondent unlawfully delayed in providing the interview dates to the Union, the ALJ seems to imply there was some nefarious intent on the part of Respondent. While stating that he was not making a finding "regarding whether or not the delay was the result of a

mere 'oversight,'" he continued to hold that "the claim that the delay was simply an oversight is suspect…." (D. 10, fn. 6). The ALJ made this determination despite the fact that Respondent had absolutely no reason to withhold the interview dates – it did not disadvantage the Union to receive the interview dates two and one-half months late. Moreover, Respondent did not gain anything by delaying in providing the information. To imply Respondent had some negative intent when it failed to provide the information sooner ignores the fact that the Union was in no way prejudiced by the delay. There is absolutely no reason Respondent would have intentionally delayed in providing the information. Instead, it was as Carr testified, just an oversight.

The ALJ cites *Naperville Jeep/Dodge*, 357 NLRB 2252 (2012), *enfd.* 796 F.3d 31 (D.C. Cir. 2015), *cert. denied* 136 S.Ct. 1457 (2016) in support of his position that two months is an unreasonable delay in providing information which is not complex or voluminous on its face; however, in *Dodge of Naperville*, the union needed the information in order to determine whether the employer repudiated the collective bargaining agreement. The agreement in that case likely provided the union with some timeframe in which it must grieve to enforce the provisions thereof or waive its right to enforcement. Unlike the information in *Dodge of Naperville*, the Union was in no way prejudiced by Respondent's oversight and instead, received the information with plenty of time prior to the arbitration hearing to conduct any investigation it deemed appropriately. Similarly, the information requested in *Amersig Graphics, Inc.*, 334 NLRB 880 (2001), another case cited by the ALJ, was necessary so the union could assess obligations related to the sale and purchase of the business. This was information that was time-sensitive and required some urgency by the employer – unlike the interview dates at issue in the instant case. In addition, in *Woodland Clinic,* 331 NLRB 735 (2000), the union requested information while the parties were engaged in negotiations and arguably had some urgency to its request so that there could be meaningful

proposals by both parties. The delay at issue in the instant case in no way prohibited the Union from pursuing its representative obligations.

Despite the fact that the cases relied upon by the ALJ in support of his finding that the delay in providing the interview dates all caused prejudice to the unions, the ALJ nonetheless rejected Respondent's assertion that the delay was not unlawful where the Union was not prejudiced by the delay. The Board has upheld an employers' delay in providing information as lawful where there is "an absence of any evidence that the union was prejudiced by the delay." *Union Carbide Co.*, 275 NLRB 197, 201 (1985) (noting that the union did not present any evidence of prejudice, meaning that the employer's ten month delay did not violate its duty to provide information); *see also USPS*, 2004 WL 1671531 (NLRB Div. of Judges July 19, 2004) (holding that an employer's four month delay did not violate Section 8(a)(5) because the union was not prejudiced by the delay); *Dallas & Mavis Forwarding Co.*, 291 NLRB 980 (1988) (seven month delay lawful given the circumstances).

Other than a generalized statement that the Union was "hoping to get a chance to do [its] own investigation," (Underhill Tr. 25), the Union did not provide any reason why it needed the dates of interviews or that the Union suffered any harm as a result of the delay. The Union could have conducted any investigation it so desired with or without the interview dates. While perhaps the Union was attempting to determine who participated in Respondent's investigation based on process of elimination and schedule comparison, it suffered no prejudice by the minor delay in receiving the information. In fact, as Underhill admitted, the Union did not conduct any investigation. (Underhill Tr. 41). It obviously was not prejudiced in an investigation it never attempted to conduct. As such, the marginal delay by Alcoa was in no way unlawful and the ALJ's determination to the contrary must be rejected.

D. The ALJ's Ordered Disclosure of Witness Names Should Be Reversed Where the Union Has No Continued Need for the Information (Exception 5)

In light of his erroneous finding that Respondent violated the Act by failing to disclose the witness names, the ALJ then ordered the disclosure of the witness names, ignoring the Union has no ongoing need for the information. In support of this remedy, the ALJ contends that in contrast to the case cited by Respondent in its post-hearing brief, *Borgess Medical Center*, 342 NLRB 1105, 1107 (2004), "the Union still needs the information in order to evaluate how to proceed regarding the pending grievance, and possibly in order to represent Williams in an appeal, request for reopening, or other avenue that either party may choose to pursue before or after the arbitrator's decision." (D. 11:41-44). In so finding, the ALJ wholly ignores the fundamental principles of arbitration. If the Union needed the information in order to proceed at arbitration, it should have sought a postponement but did not. Instead, it proceeded to hearing. There is no basis for now reopening the record based on information of which both parties were aware at hearing but unused by both parties. Neither Respondent nor the Union used the unredacted witness statements or witness names at the arbitration. If any party was disadvantaged by Respondent's failure to disclose the witness names at hearing, it was Respondent because it could not give full effect to the witness statements confirming Williams' misconduct.

The facts as they currently exist are that the Union proceeded to arbitration without the witness names, the names were not disclosed at hearing, and the record (and consequently the matter) is closed. (Underhill Tr. 41-42). In *The Boeing Company,* 362 NLRB No. 24, *4 (2016), the Board noted that if the employer meets its burden of establishing the requesting union has no need for the requested information, "the Board will not order the employer to produce it, despite finding the violation."

The Union has no continued need for the information – other than to perhaps harass witnesses – where the evidence establishes the Union only claimed they wanted the information to conduct an investigation into Williams' discipline in order to prepare for arbitration and the arbitration challenging his grievance has concluded. (Underhill Tr. 41). There is no additional investigation that needs to occur and the Union has met its duty to fairly represent Williams, as Underhill stated as the concern. (Underhill Tr. 25). At this time, the Union has no need for the information. Nonetheless, Respondent still has concerns that if the witness names were disclosed, other employees may receive treatment similar to that reported by Taborn (to date the only witness known to the Union). As such, even if Alcoa unlawfully refused to provide the witness names, the Board should not order production of the unredacted witness statements as there is no continued need for this information.

IV. CONCLUSION

For the reasons discussed herein, Respondent Alcoa Corporation respectfully asks that the Complaint and underlying charge be dismissed in its entirety; that the exceptions of Respondent Alcoa Corporation be granted; and that the portions of the Decision of the ALJ addressed above be reversed.

Respectfully submitted,

By: */s/ Sarah M. Rain*

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Dated: April 24, 2019

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
ALCOA CORPORATION	)	
	)	
Respondent,	)	Case No. 25-CA-219925
	)	
and	)	
	)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS LOCAL 104,	)	
	)	
Charging Party.	)	

CERTIFICATE OF SERVICE

I do hereby certify that on April 24, 2019, a true and correct copy of the foregoing Brief in Support of Exceptions to the Administrative Law Judge's Decision was *Electronically Filed* on the NLRB's website http://www.nlrb.gov.

Also, I do hereby certify that a true and correct copy of the foregoing Brief in Support of Exceptions to the Administrative Law Judge's Decision has been served by electronic mail this 24th day of April, 2019 on: Raifael Williams at Raifael.Williams@nlrb.gov and Marty Ellison at mellison@usw.org.

By: /s/ *Sarah M. Rain*
Counsel for Alcoa Corporation